



**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM



# Proving Exposure to Agent Orange

A Comprehensive Review and Advocacy Advice

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# AGENDA

- **BACKGROUND**
- **REPUBLIC OF VIETNAM**
  - **BLUE WATER NAVY UPDATE**
- **KOREAN DMZ**
- **C-123**
- **THAILAND**
- **ACTUAL AGENT ORANGE EXPOSURE**

# Background



- Vets who can establish in-service exposure to herbicides containing 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram, are generally entitled to presumptive SC for diseases listed in **38 C.F.R. § 3.309(e)** (IHD, type 2 diabetes, Parkinson’s disease, respiratory cancers, non-Hodgkin’s lymphoma, Hodgkin’s disease, multiple myeloma, soft tissue sarcomas, prostate cancer, etc.)
- For ease of reference: “Agent Orange”

# Methods for Proving AO Exposure



1. Presumption
2. Concession
3. Actual exposure

# Presumptive Exposure

- VA will presume AO exposure for Vets who:
  - Served on the land, inland waterways, or territorial waters of the **Rep. of Vietnam any time from 1/9/1962 through 5/7/1975**
  - Served along the **Korean DMZ any time from 9/1/1967 through 8/31/71**
  - Regularly and repeatedly operated, maintained, or served **onboard C-123 aircraft that, during the Vietnam era, sprayed AO**

# PRESUMPTIVE EXPOSURE: REPUBLIC OF VIETNAM



# Presumptive Exposure – Vietnam



- Brief service in RVN difficult to prove
  - Short assignments / travel by Vets regularly stationed outside RVN
- Not usually noted in service records

# Presumptive Exposure – Vietnam



- Vet’s testimony or written statement can be enough to establish boots on the ground.
  - Statement competent evidence (usually)
    - “Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.” 38 C.F.R. § 3.159(a)(2).
    - No corroboration requirement!
  - BUT, statement must be found credible by VA.
    - Finding Vet not credible must be adequately supported.

# Presumptive Exposure – Vietnam



- Even though Vet's statement alone can be enough to prove Vietnam service, Vet will have a better chance at success with corroborating evidence:
  - Official Military Records, including unit histories
  - Letters home
  - Buddy statements
  - Unofficial unit histories
  - Pictures sufficient to show location

# Presumptive Exposure – Vietnam



- Many Vets got off a plane and set foot in RVN while en route to other locations.
  - Navy Vets commonly spent time in RVN while awaiting transport to a ship elsewhere in the region
  - Vets with service in Laos and Thailand would routinely layover in RVN for plane refueling or to deliver cargo
- Flight records of routes and passengers related to specific flights are typically unavailable.

# Presumptive Exposure – Vietnam



- **Helpful info for proving a Vet stopped in RVN while on a flight to/from another destination:**
  - An archivist from the Air Force Historical Research Agency reported that, as a general rule, military cargo aircraft, especially those engaged in “airlines,” would stop over at Ton Son Nhut Air Base, RVN, en route to bases in Thailand, and that very few of these sorts of flights were made direct to bases in Thailand from bases outside Southeast Asia.
    - *Parseeya-Picchione v. McDonald*, 28 Vet. App. 171, 176 (2016)

# Presumptive Exposure – Vietnam



- **Helpful info for proving a Vet stopped in RVN while on a flight to/from another destination (cont.):**
  - Many Navy Vets who joined a ship off the coast of Vietnam mid-deployment needed to stop in RVN for their transport plane to refuel, or to get on a helicopter or small boat to reach their ship
  - Vet may be able to corroborate statement with orders showing the place of departure, deck logs showing the location of the ship on the date of arrival, statements from pilots who conducted similar missions, and info about the range of the transportation vehicle.

# Presumptive Exposure – Vietnam



- **Special procedures for RVN service from 1/9/1962 to 8/5/1964:**
  - Vets who served in RVN were awarded the Armed Forces Expeditionary Medal (AFEM) rather than the VSM
  - They were often sent on TDY/TAD from other SE Asian countries or the U.S.
  - Because U.S. not officially involved in the war, Vet's duties may have been classified and presence in RVN not noted in personnel record

# Presumptive Exposure – Vietnam



- **Special procedures for RVN service from 1/9/1962 to 8/5/1964 (cont.):**
  - If Vet alleges service in RVN during period, but it isn't otherwise apparent, VA must obtain and review Vet's personnel record
    - Must pay attention to receipt of AFEM, travel/flight orders, statements in performance evals related to travel/flights, and TDY/TAD orders, and give Vet the benefit of the doubt
    - For Vets who flew on C-123 aircraft that conducted AO spray missions, other indications of RVN service include evidence of flight status and type of aircraft assignments
    - VA Compensation Service Bulletin, *Adjudicating Certain Agent Orange Exposure-Related Claims*, 2 (Dec. 2012).

# Presumptive Exposure – Vietnam



- **Special procedures for Vets with naval aviation service:**
  - Some naval aviation squadrons were based in RVN and aircraft from some squadrons rotated in and out of RVN for TAD
  - If Vet with naval aviation service files a claim based on AO exposure in RVN and initial development does not show evidence of in-country service, VA must conduct further development
    - Request Vet's complete military records and/or unit research by JSRRC
    - Check Dictionary of American Naval Aviation Squadrons website for evidence of the squadron's service in RVN

# Presumptive Exposure – Vietnam



- **Special procedures for Vets with naval aviation service (cont.):**
  - If unit history shows squadron was based in RVN or had a rotation on land in RVN, and Vet provides a statement that he or she served in-country, VA will presume Vet exposed to AO
  - *VA C&P Service Bulletin, Agent Orange Exposure Among Naval Aviation Veterans of the Vietnam Era, 2–3 (Feb. 2011).*

# Presumptive Exposure – Vietnam



- **Vets who served onboard ships are entitled to presumption of AO exposure if they served on:**
  - A ship that operated, even temporarily, on the inland waterways, including all LSTs, LCVPs, PCFs, and PBRs
  - A ship that operated in the territorial sea of RVN (12nm from shore). More on this later!

# Presumptive Exposure – Vietnam



- Avenues of AO exposure NOT recognized by VA:
  - 1. Service in waters > 12nm from shore of RVN**
    - BUT, presumptive SC for NHL and CLL available under § 3.313
  - 2. Loading AO aboard a ship for transport to RVN**
  - 3. Serving on a ship that transported, stored, used, or tested AO**
  - 4. Working on shipboard aircraft that flew over RVN or equipment that was used in RVN**
  - 5. Vets who flew over RVN in aircraft, but did not land**

# Presumptive Exposure – Vietnam



- Special effective date rules may apply to Vets who are granted presumptive SC for a disease based on exposure to AO in RVN under the Court Orders in the class action *Nehmer v. U.S. Dept. of Veterans Affairs*.
  - 38 C.F.R. § 3.816

# Presumptive Exposure – Vietnam



- **Special effective date rules:**
  - For all diseases currently on the AO presumptive list VA was required to:
    - Identify all Vietnam Vets and their survivors who applied, or who had applications pending for SC based on the disease between 9/25/1985 and the publication date of the regulation adding the disease

# Presumptive Exposure – Vietnam



- **Special effective date rules:**
  - Re-decide whether benefits are warranted for the disease under the new regulation, after allowing claimant to add new evidence
  - If SC granted, VA must assign an effective date for benefits based on the date of the original claim that was pending or denied on or after 9/25/1985

# Presumptive Exposure – Vietnam



- **Special effective date rules:**
  - Under Footnote 1 of the 1991 *Nehmer* Final Stipulation and Order, if Vet filed an SC or pension claim for disability X and, before the claim was finally denied or granted, evidence in the c-file showed that the Vet had a disease that was later added to VA's AO presumptive list, then the claim for disability X, also counts as a claim for the AO disease

# Presumptive Exposure – Vietnam



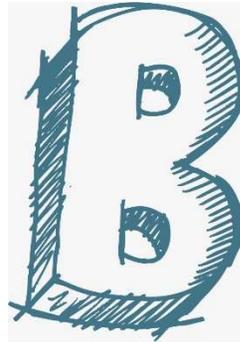
- Example of FN1 claim:
  - Vietnam Vet filed SC claim for PTSD in Nov. 1993
  - Vet dx with IHD in June 1994 and dx included in medical records obtained by VA while adjudicating PTSD claim
  - VA granted PTSD claim in 1995
  - Vet filed a SC claim for IHD in May 2007 that was denied
  - Aug. 2010: VA added IHD to the AO presumptive list

# Question #1

- What effective date should VA assign for SC for IHD?
  - A. Nov. 1993 (date of PTSD claim)
  - B. June 1994 (date of IHD diagnosis)
  - C. May 2007 (date of formal claim for SC for IHD)
  - D. Aug. 2010 (date IHD added to AO presumptive list)



# Presumptive Exposure – Vietnam



- Under FN1, the IHD effective date should go back to June 1994 (date of diagnosis) b/c Vet had a claim pending (1993 PTSD claim) when he was initially diagnosed w/ IHD, and the dx was part of the c-file when VA adjudicated the PTSD claim.

# Presumptive Exposure – Vietnam



- If retro benefits are awarded under *Nehmer*, but the Vet or DIC claimant is deceased, VA must pay the retro benefits to the following (in order of priority):
  1. Surviving spouse of the claimant
  2. Surviving children of the claimant, even if adults
  3. Surviving parents, regardless of dependency or income
  4. Estate of the claimant

# Presumptive Exposure – Vietnam



- Special effective date rules:
  - If the claimant first filed a claim for service connection of a disability after the disease was added to the AO presumptive list, *Nehmer* rules do not apply to the claim

# BLUE WATER NAVY VIETNAM VETERANS



# Presumptive Exposure – Vietnam Territorial Sea

- Recent Development in AO Rules:
  - **VA must presume AO exposure for Vets who served in the 12 nm territorial sea of RVN!**
- History:
  - 2008: Fed. Cir. upheld VA's interpretation of § 3.307 as requiring Vets to have set foot on the landmass of RVN or served on inland waterways (*Haas v. Peake*)
  - 2018: in *Procopio*, full Fed. Cir. decided on its own to re-look at issue

# *Procopio v. Wilkie*

- Fed. Cir.:
  - Addressed whether Vets who served in the territorial sea of RVN “served in the Republic Vietnam” w/in the meaning of 38 U.S.C. § 1116 and are therefore entitled to the presumptive SC for diseases associated with AO exposure
  - Looked to see if Congress spoke directly to whether the territorial sea is part of the “Republic of Vietnam”

# *Procopio v. Wilkie*

- Some Fed. Cir. considerations:
  - Congress chose to use the formal name of the country and invoke a notion of territorial boundaries by stating that "service in the Republic of Vietnam" is included
  - Int'l law uniformly confirms that the "Republic of Vietnam," like all sovereign nations, included its territorial sea
  - In 1958, U.S. entered into the Convention on the Territorial Sea and the Contiguous Zone, agreeing that the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

# *Procopio v. Wilkie*

- Some Fed. Cir. considerations (cont.):
  - The 1982 U.N. Convention on the Law of the Sea stated that the sovereignty of a coastal State extends to an adjacent belt of sea, called the territorial sea, having a breadth not exceeding 12 nm.
  - When the Agent Orange Act of 1991 was passed, the "Republic of Vietnam" included both its landmass and its 12 nm territorial sea.

# *Procopio v. Wilkie*

- Some Fed. Cir. considerations (cont.):
  - This uniform int'l law was the backdrop against which Congress adopted the Agent Orange Act. By using the formal term "Republic of Vietnam," Congress unambiguously referred, consistent with that backdrop, to both its landmass and its territorial sea.
  - § 1116(a)(1) expressly includes "active military, naval, or air service . . . in the Republic of Vietnam," reinforcing the conclusion that Congress was expressly extending the presumption to naval personnel who served in the territorial sea

# *Procopio v. Wilkie*

- Holding:
  - The intent of Congress is clear that Vets who served in the 12 nm territorial sea of the Republic of Vietnam are entitled to the presumption of service connection for diseases associated with Agent Orange exposure.
  - ***Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019)**

# BWNVVA of 2019

- **6/25/2019: Blue Water Navy Vietnam Veterans Act of 2019** signed into law, **effective 1/1/2020**
  - Congress codified holding in *Procopio*
  - Set precise coordinates for line along RVN coast from which 12nm to be measured
  - **Allows for retro benefits for claims filed 9/25/1985-12/31/2019**
    - If claim previously denied, Vet or DIC claimant **must file supplemental claim** to get retro

# BWNVVA of 2019

- VA required to conduct outreach to notify affected Vets that they should submit or resubmit claims
  - Put info on VA's website
  - Notify VSO community in writing
  - 10/2019: VA sent letters to claimants previously denied
    - 73,180 letters to BWN Vets w/ comp denials
    - 4,494 letters to survivors w/ DIC denials
    - 0 letters (apparently) to survivors of dead claimants

# BWNVVA of 2019

- VA was allowed to stay pending cases until 1/1/2020
  - 7/1/2019 – VA issued memo staying cases, except those in which BVA or CAVC had directed award of SC

# Ship Locator Tool / Deck Logs

- 2/2019: VA began developing a ship locator tool that uses deck logs from the Navy and Coast Guard to plot which ships entered the territorial seas of RVN, to make it easier to adjudicate claims
- VA obtained millions of deck logs from NARA and provided them to contractor for scanning
- 7/2019: VA incorporated coordinates of territorial sea from BWN Act and completed prototype of tool

# Ship Locator Tool / Deck Logs

- 12/2019: VA finished digitizing Navy deck logs
- 9/2020: VA finished digitizing Coast Guard deck logs
- Deck logs available / will be available at:  
<https://www.archives.gov/research/military/logbooks/navy-online>
- VA tool not available to public
- Law firm made similar tool, but not all ship data included
  - <https://www.hillandpontton.com/blue-water-navy-vietnam-map/>

# Blue Water Navy Stats

- VA started adjudicating claims 1/1/2020
- As of 8/31/2020:
  - Claims rcvd by VA: 66,853
  - Claims decided: 31,774
    - Grants: 22,524 (71%)
    - Denials: 9,250 (29%)
  - Benefits awarded: \$641 million

# Effective Dates under BWNVVA



- If BWN Vet or “survivor” filed claim for SC or DIC for condition now linked to AO between 9/25/1985 and 12/31/2019, and claim was denied, claimant may be able to get benefits retro to date denied claim was filed (or earlier based on other claim rules)
  - Prior claim must have been denied because disease not incurred in or aggravated by service
  - Claimant must file supplemental claim to get retro
    - Must claim same disease that was denied or DIC
    - Needs new and relevant evidence (current dx, lay statement of presence w/in 12nm of RVN, etc.)

# Effective Dates under BWNVVA



- If prior claimant deceased, “survivor” *should be* entitled to retro benefits for period covering date of prior claim to date of claimant’s death
- “Survivor” (in order of precedence) =
  - Surviving spouse of claimant
  - Surviving child of claimant
    - Unclear if adult children qualify
  - Surviving dependent parent of claimant
    - Unclear if non-dependent parents qualify

# Effective Dates under BWNVVA



- If *initial* claim for benefit granted under BWNVVA, the effective date for benefits should be the date of claim, even if claim filed before 1/1/2020
  - Or earlier based on other claim rules
    - DIC claim filed w/in year of Vet's death
    - SC claim filed w/in one year of separation

# Effective Dates under BWNVVA



- VA has not yet issued proposed regs or published guidance in Manual M21-1 to provide clarification regarding awards of retro benefits under the BWNVVA

# *Nehmer* and Blue Water Vietnam Veterans



- BWNVVA does not:
  - Require automatic readjudication of previously denied claims
  - Require payment of benefits to estate if claimant now deceased, and no surviving spouse, child, or parent
  - Apply to claims filed prior, but pending on 9/25/85
- *Nehmer* DOES!
  - Also clearly requires retro payments to adult children of deceased claimant if no surviving spouse, and to non-dependent parents if no surviving spouse or child

# *Nehmer* and Blue Water Vietnam Veterans



- 12/13/2019: VA issued VAOPGCPREC 3-2019, Effective Date Provision of the Blue Water Navy Vietnam Veterans Act of 2019
  - BWNVVA does not authorize VA to pay estates of claimants
    - Cites VA regs re term “survivor”
  - Neither *Procopio* nor BWNVVA trigger VA’s obligation under *Nehmer* to readjudicate previously denied claims

# *Nehmer* and Blue Water Vietnam Veterans

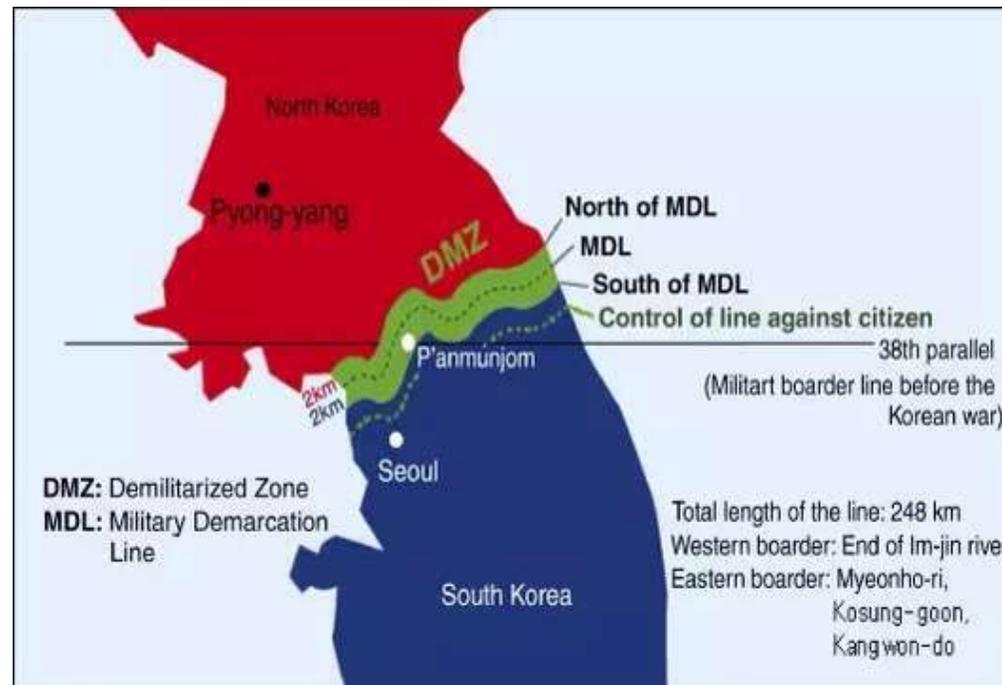


- 7/10/2020: NVLSP filed motion to enforce judgment in *Nehmer*
  - Argued that VA's obligations under *Nehmer* apply to Vets with service in territorial sea of RVN
- 8/14/2020: VA filed opposition to motion
- 9/3/2020: NVLSP filed reply to VA opposition
- 10/28/2020: Hearing scheduled

# Advocacy Advice

- Vets who served in RVN's 12nm territorial sea or their survivors with prior final denial of AO-related claim (comp or DIC) should file supplemental claim for SC for same disease, DIC, or accrued benefits
  - Include new and relevant evidence
- Be on the lookout for cases in which claimant is deceased and encourage survivor to file for retro benefits
- If no prior claim for AO-related disease, file initial claim ASAP to preserve effective date!

# PRESUMPTIVE EXPOSURE: KOREAN DMZ



# Presumptive Exposure – Korean DMZ

- DoD estimates that over 12,000 U.S. troops were exposed to Agent Orange along the Korean DMZ.
- An area 151 miles long and up to 350 yards wide along the south edge of the DMZ and north of the civilian control line was hand sprayed with AO and similar herbicides in the late 1960s.



# Presumptive Exposure – Korean DMZ



- DoD has identified several units that operated in or near the DMZ in South Korea, in an area where AO is known to have been sprayed.
  - MANUAL M21-1, IV.ii.1.H.3.b (change date Dec. 31, 2019).
- Vets who served in an identified unit between Sept. 1, 1967, and Aug. 31, 1971, presumed exposed to AO
  - 38 C.F.R. § 3.307(a)(6)(iv)

# Presumptive Exposure – Korean DMZ



- Units presumed exposed to AO:
  - **Combat Brigade of the 2nd Infantry Division (ID) or 3rd Brigade of the 7th ID** (may have been attached to either ID):
    - **1st Battalion**—72nd Armor, 73rd Armor, 12th Artillery, 15th Artillery, 9th Infantry, 17th Infantry, 23rd Infantry, 31st Infantry, 32nd Infantry, 38th Infantry
    - **2nd Battalion**—72nd Armor, 9th Infantry, 17th Infantry, 23rd Infantry, 31st Infantry, 32nd Infantry, 38th Infantry
    - **2<sup>nd</sup> Squadron** – 10th Cavalry
    - **3rd Battalion**—23rd Infantry, 32nd Infantry
    - **5th Battalion**—38th Artillery
    - **6th Battalion**—37th Artillery
    - **7th Battalion**—17th Artillery

# Presumptive Exposure – Korean DMZ



- Units presumed exposed to AO:
  - **Combat Brigade of the 2nd Infantry Division (ID) or 3rd Brigade of the 7th ID** (may have been attached to either ID) (cont.):
    - 54<sup>th</sup> CBRE Detachment (**new as of 6/2019**)
    - 6<sup>th</sup> Aviation Platoon (**new as of 6/2019**)
      - deactivated 4/15/69 and incorporated into the 239<sup>th</sup> Aviation Co.
    - 239<sup>th</sup> Aviation Company (**new as of 6/2019**)
      - Service in the DMZ for members of the 6<sup>th</sup> Aviation Platoon or 239<sup>th</sup> Aviation Company limited to helicopter crewmen, which generally consisted of pilots, crew chief, and door gunners

# Presumptive Exposure – Korean DMZ



- Units presumed exposed to Agent Orange (cont.):
  - **2nd Engineer Battalion, 2nd ID**
  - **2nd Military Police Company, 2nd ID**
  - **25th Chemical Company, 2nd ID**
  - **13th Engineer Combat Battalion**
  - **Division Reaction Force: 4th Squadron, 7th Cavalry**
  - **UN Command Security Battalion—Joint Security Area**
  - **Crew of the USS Pueblo**

# Presumptive Exposure – Korean DMZ



- Prior to 2/24/2011, VA would only concede that a Vet was *actually* exposed to AO, and only if VA determined Vet served along DMZ between 4/1968 and 7/1969.
- Effective date for benefits based on AO exposure along DMZ between 8/1969 and 8/1971 can be no earlier than 2/24/2011.
  - *McKinney v. McDonald*, 796 F.3d 1377, 1384 (Fed. Cir. 2015)

# Presumptive Exposure – Korean DMZ



- Prior to 1/1/2020, VA did not presume AO exposure for service along DMZ from 9/1/1967-3/31/1968
- Effective date for benefits based on AO exposure along DMZ during this period can be no earlier than 1/1/2020

# Presumptive Exposure – Korean DMZ



- If Vet alleges AO exposure along DMZ, but was in a non-listed unit or outside the presumptive date range, VA should request verification from JSRRC.
  - Base civil engineer and other grounds maintenance records should be specifically referenced in the research request, because Base Civil Engineers were responsible for maintaining info regarding acquisition and use of herbicides.

# PRESUMPTIVE EXPOSURE: C-123 AIRCRAFT



# Presumptive Exposure – C-123 Aircraft

- During the Vietnam War, AO was sprayed by C-123 Provider Aircraft as part of Operation Ranch Hand.
- After spraying operations ended, between 1972 and 1982, these aircraft were used for routine cargo and medical evacuation missions.
- Approximately 1,500-2,100 Air Force Reservists trained and worked on these aircraft during this period.



# Presumptive Exposure – C-123 Aircraft

- In Jan. 2015, IOM released a report finding that:
  - C-123s that sprayed AO continued to have AO residue on their interior surfaces years after returning to the U.S.
  - Air Force Reservists would have been exposed to AO residue when working inside the aircraft, and some of them “quite likely experienced non-trivial increases in their risks of adverse health outcomes.”

# Presumptive Exposure – C-123 Aircraft

- On 6/19/2015, VA updated its AO rules based on IOM's findings.
  - VA determined that this exposure may have occurred during a longer period than initially identified by IOM—1969 through 1986.
  - VA found that some active duty Air Force personnel, in addition to Reservists, may have been exposed.

## Presumptive Exposure – C-123 Aircraft

- VA now presumes that a person who served in the Air Force or Air Force Reserve and “regularly and repeatedly operated, maintained, or served onboard C-123 aircraft known to have been used to spray an herbicide agent during the Vietnam era” was exposed to AO.
- 38 C.F.R. § 3.307(a)(6)(v)

# Presumptive Exposure – C-123 Aircraft

- Person must have:
  1. Been assigned to an Air Force or Air Force Reserve squadron when the squadron was permanently assigned one of the affected aircraft, AND
  2. Had an Air Force Specialty Code (AFSC) indicating duties as a flight, ground maintenance, or medical crew member on one of these aircraft.
- Rules apply to claims pending on or after 6/19/2015

# Presumptive Exposure – C-123 Aircraft

- **Qualifying Reserve Units**

- **Pittsburgh International Airport, Pennsylvania, USAF Reserve Station**
- Dates: 1972-1982
  - 758th Airlift Squadron
  - 911th Aeromedical Evacuation Squadron
  - 911th Aircraft Maintenance Squadron
- **Westover AFB (Westover Air Reserve Base) and Hanscom Field AFB, Massachusetts**
- Dates: 1972-1982
  - 731st Tactical Airlift Squadron
  - 74th Aeromedical Evacuation Squadron
  - 901st Organizational Maintenance Squadron

# Presumptive Exposure – C-123 Aircraft



- **Qualifying Reserve Units (cont.):**
  - **Lockbourne/Rickenbacker AFB, Ohio (USAF Reserves, Rickenbacker Air National Guard Base)**
  - **Dates: 1969-1986**
    - 355th Tactical Airlift Squadron
    - 356th Tactical Airlift Squadron
    - 4413th Combat Crew Tactical Wing [Ferry Flights]

# Presumptive Exposure – C-123 Aircraft

- **Qualifying Active Duty Units (U.S.)**
  - **Hurlburt Auxiliary Field, Eglin AFB, Florida**
  - Dates: 1970-1973
    - 1st Special Operations Wing
    - 4410th Combat Crew Tactical Wing [Ferry Flights]
  - **Langley AFB, Virginia**
  - Dates: 1970-1973
    - 4500th Air Base Wing [Aerial Spray Flights]
  - **Luke AFB, Arizona**
  - Dates: 1970-1973
    - 56th Air Base Wing

# Presumptive Exposure – C-123 Aircraft

- **Qualifying Active Duty Units (Overseas)**
  - **Tainan Air Field, Taiwan**
  - Dates: 1969-1970
    - 309th Special Operations Squadron
    - 310th Special Operations Squadron
  - **Howard AFB, Panama**
  - Dates: 1970-1973
    - 24th Special Operations Wing

# Presumptive Exposure – C-123 Aircraft



- **Qualifying Active Duty Units (Overseas)**
  - **Osan Air Base, South Korea**
  - Dates: 1970-1973
    - 51st Air Base Wing
  - **Clark AFB, Philippines**
  - Dates: 1969-1970
    - 405th Fighter Wing

# Presumptive Exposure – C-123 Aircraft

- **Qualifying Air Force Specialty Codes**
  - **Officer AFSCs**
    - Pilot/Copilot, Transport and Tactical Airlift: 1043-1055
    - Flight Nurse: 9761-9766
  - **Enlisted AFSCs**
    - Flight Engineer/Aircraft Loadmaster: 1130–1149
    - Aircrew Life Support Specialist: 1220–1229
    - Aircraft Maintenance Specialist/Flight Technicians: 4313–4359
- VA will accept any relevant evidence showing the required regular and repeated contact because many of these code numbers changed during the relevant time period

# Presumptive Exposure – C-123 Aircraft



- People do not generally qualify for presumptions of SC based on periods of ACDUTRA and INACTDUTRA
- VA made an exception for people exposed to AO while working on a C-123

# Presumptive Exposure – C-123 Aircraft

- If exposure occurred during ACDUTRA or INACDUTRA the exposure is an injury for purposes of establishing “veteran” status
- If the exposed Vet develops a disease VA recognizes as presumptively caused by AO, VA will presume the person became disabled during that period of service, which VA will consider to be “active” service

# Presumptive Exposure – C-123 Aircraft

- **Effective Date for Benefits:**
  - Claim pending on 6/19/2015: **Date of claim**
  - Claim filed 6/19/2015 to 6/19/2016, and Vet had disease on 6/19/2015: **6/19/2015**
  - Claim filed after 6/19/2016, and Vet had disease on 6/19/2015: **1 year prior to date of claim**
  - Claim filed after 6/19/2015, but Vet did not have disease until after 6/19/2015: **Date of claim**

# Presumptive Exposure – C-123 Aircraft



- **Claim Advice**

- On VA claim form, note “(C-123)” after listing any disability claimed as being caused by AO
- If available, include:
  - Discharge, separation papers, (DD 214 or equivalent)
  - USAF Form 2096 (unit where assigned at time of training)
  - USAF Form 5 (aircraft flight duties)
  - USAF Form 781 (aircraft maintenance duties)
  - Medical evidence

# CONCEDED EXPOSURE: THAILAND



# Conceded Exposure – Thailand



- In 2010, VA found there was significant use of herbicides on the fenced perimeters of military bases in Thailand based on the declassified DoD document *Project CHECO Southeast Asia Report: Base Defense in Thailand*
  - Herbicides may have included AO and strong commercial herbicides similar to AO
- VA created special rules for the concession of herbicide exposure for Vets whose duties placed them on or near the perimeter of Thailand military bases during the period 2/28/1961 to 5/7/1975

# Conceded Exposure – Thailand



- VA concedes the following were exposed:
  1. AF Vets who served at the RTAFBs of U-Tapao, Ubon, Nakhon Phanom, Udorn, Takhli, Korat, or Don Muang as security policemen, security patrol dog handlers, or members of a security police squadron, or otherwise served near a base perimeter, as shown by evidence of daily work duties, performance evaluations, or other credible evidence.
- MANUAL M21-1, IV.ii.1.H.4.b (change date Dec. 31, 2019)

# Conceded Exposure – Thailand



- VA often fails to properly consider whether non-security personnel served “otherwise near the air base perimeter”
- VA often fails to consider lay evidence of service near a base perimeter, which, if credible, is enough to support claim
- “Near” is not defined
- “Serve” is not defined
  - Frequency?
  - Type of activity?

# Conceded Exposure – Thailand



- The closer the proximity to, the greater the frequency of visits near, and the longer the period of time spent near the perimeter, the more likely VA will concede exposure
- Advocates should help Vet prepare a detailed statement regarding service near perimeter
- Help Vet obtain base maps and pictures on which he can show where the service occurred
- Since criteria are vague, most Vets should appeal if VA denies concession of exposure

# Conceded Exposure – Thailand



- VA concedes the following were exposed (cont.):
  2. Army Vets who served on a RTAFB who state they were involved with perimeter security duty, if there is additional credible supporting evidence.
  3. Vets who served at a U.S. Army base in Thailand as a member of a military police unit or who had a military police MOS, and who state their duty placed them at or near the base perimeter.
- MANUAL M21-1, IV.ii.1.H.4.b (change date Dec. 31, 2019)

# Conceded Exposure – Thailand



- M21-1 rules can only *help* Vets prove exposure
- VA can't find Vet not exposed to herbicides *solely* because criteria not met
  - Must consider the places, types and circumstances of Vet's service as shown by service records, the official history of each organization in which he served, medical records and all pertinent medical and lay evidence
    - 38 U.S.C. § 1154; 38 C.F.R. § 3.303(a)

# Conceded Exposure – Thailand



- If Vet denied SC for an AO-related disease prior to 2010 based on VA's finding of no exposure to AO in Thailand, but Vet later granted SC based on concession of exposure, effective date for benefits governed by 38 C.F.R. § 3.156(c):
  - Denied claim may be reconsidered based on receipt of "service records that are related to a claimed in-service event, injury, or disease."
  - DoD's *Project CHECO Southeast Asia Report: Base Defense in Thailand* considered a "service record."
    - VA Comp. Service Bulletin, *Effective Date for Claims Involving Exposure to Agent Orange with Thailand Base Perimeter Duty*, 1–2 (Dec. 2011)

# Conceded Exposure – Thailand



- Effective date should be the later of:
  1. Date VA received the previously denied claim, or
  2. Date entitlement arose, which is generally the later of:
    - Date of the Vet's diagnosis with the disease, or
    - Effective date of VA's addition of the disease to AO presumptive list

# Conceded Exposure – Thailand



- Example:
  - 6/1994: VA adds lung cancer to AO presumptive list
  - 4/2006: Vet diagnosed with lung cancer
  - 8/2006: Vet files claim for SC for lung cancer, based on herbicide exposure in Thailand
  - 12/2006: VA denies claim and Vet does not appeal
  - 11/2019: Vet files supplemental claim for SC for lung cancer
  - 9/2020: VA grants SC for lung cancer based on herbicide exposure in Thailand

## Question #2

What effective date should the VA assign?

- A. June 1994 (date VA added lung cancer to AO presumptive list)
- B. Apr. 2006 (date Vet diagnosed with lung cancer)
- C. Aug. 2006 (date of original claim for SC for lung cancer)
- D. Nov. 2019 (date of supplemental claim)

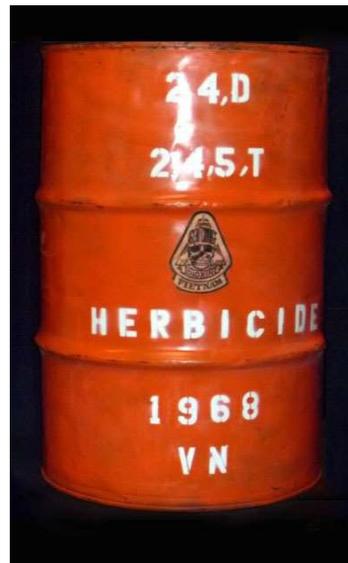


# Conceded Exposure – Thailand



- Aug. 2006 – the date of the Vet’s previously denied claim for SC for lung cancer.
  - 38 C.F.R. § 3.156(c)

# ACTUAL AGENT ORANGE EXPOSURE



# Actual Agent Orange Exposure



- Vets who do not qualify for the presumption or concession of AO exposure can still qualify for presumptive SC of diseases linked to AO exposure
- Vets must prove “actual” exposure to AO, which is difficult

# Actual Agent Orange Exposure



- AO was sprayed, tested, or stored in dozens of locations other than RVN, Korea, and Thailand, from 1945 to 1978, including:
  - **Eglin Air Force Base, Florida (1952, 1962-1970)**
  - **Fort Drum, New York (1959)**
  - **Fort Ritchie, Maryland (1963)**
  - **Hilo and Kauai, Hawaii (1966-1968)**
  - **Fort Chaffee, Arkansas (1967)**
  - **Fort Gordon, Georgia (1967)**
  - **Aberdeen Proving Ground, Maryland (1969)**

# Actual Agent Orange Exposure



- Other locations where AO was sprayed, tested, or stored:
  - **Puerto Rico (1956, 1966, 1967)**
  - **Gulfport, Mississippi (1968-1970)**
  - **Johnston Island (1972-1977)**
  - **Laos (1965-1967)**
  - **Cambodia (1969)**
  - **Vietnam (in August 1961, prior to presumptive period)**
- The complete list of locations and dates confirmed by DoD:
  - [https://www.publichealth.va.gov/docs/agentorange/dod\\_herbicides\\_outside\\_vietnam.pdf](https://www.publichealth.va.gov/docs/agentorange/dod_herbicides_outside_vietnam.pdf)
  - List was updated in 12/2019

# Actual Agent Orange Exposure



- Even though DoD has confirmed the use or storage of AO in these locations, VA will not presume Vets were exposed to AO merely because they were present in these areas
- Vets must prove *actual* exposure to AO

# Actual Agent Orange Exposure



- Advice for proving actual AO exposure:
  - Submit service records or other evidence showing Vet served in the area during the relevant period
  - Point to evidence indicating that Vet came into direct contact with AO
  - Supporting evidence can include the Vet's own detailed statement, buddy statements, and performance evaluations

# Actual Agent Orange Exposure



- Advice for proving actual exposure (cont.):
  - Provide the approximate date, location, and nature of the exposure, and the unit to which Vet was assigned, so VA can submit a research request to JSRRC
  - Argue that, in light of the DoD's acknowledged use of AO while Vet was present in that location and the evidence indicating Vet had contact with AO, VA should give Vet the benefit of the doubt and find actual exposure

# Actual Agent Orange Exposure – Eglin AFB



- VA has issued specific guidance for claims based on AO exposure at **Eglin Air Force Base**:
  - Extensive testing of AO aerial spray equipment used during Operation Ranch Hand occurred at **Eglin Air Force Base** from 1964 through 1970
  - Any evidence indicating that a Vet was involved with this testing, or performed duties in the area of testing, is sufficient to establish exposure
    - VA Compensation Service Bulletin, *Adjudicating Certain Agent Orange Exposure-Related Claims*, 3 (Dec. 2012)

# Actual Agent Orange Exposure – Fort Drum



- DoD only concedes AO used at Fort Drum in 1959, but...
- July 1981 Report By Chemical Systems Laboratory at the Aberdeen Proving Ground:
  - Chemicals found in AO were discovered at Fort Drum in 10 five-gallon metal cans stored in an unheated wooden frame building with a wooden floor. This facility did not meet present day requirements for storage of chemicals.
  - 1961: Dow Chemical Company tested an experimental defoliant along a road at Fort Drum

# Actual Agent Orange Exposure – Fort Drum



- July 1981 Report By Chemical Systems Lab (cont.):
  - 1950s: a large quantity of herbicide sprayed from a helicopter over a site in the main impact area
  - 1969 to 1978: herbicides used to control vegetation along fences and control brush along two roads in the main impact area
  - 1950s through the early 1970s: herbicides used on range impact areas to improve the line of vision from observation points to target impact areas

# Actual Agent Orange Exposure – Fort Drum



- Feb 1984: Official at the U.S. Army Toxic and Hazardous Materials Agency wrote that samples collected for a survey would be tested for the presence of chemicals associated with AO, because AO was used on the range impact areas to improve the line of vision from observation points to target impact areas during the 1960s through the early 1970s
  - *Malinowski v. Gibson*, Vet.App. No. 13-0016 (June 19, 2014)
  - *Malinowski v. Shulkin*, Vet.App. No. 16-0614 (Oct. 31, 2017)

# Actual Agent Orange Exposure – Form Drum



- BVA has cited *Malinowski* in finding that some Vets were exposed to AO at Fort Drum.
- In addition to detailed lay statements, Vets claiming AO exposure at Fort Drum should submit copies of BVA decisions and the *Malinowski* decisions. Get them here:
  - <https://www.index.va.gov/search/va/bva.jsp>
  - <https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp>

# Actual Agent Orange Exposure – Other Locations

- Many Vets have alleged AO use or storage at locations other than those conceded by DoD:
  - Guam
  - Okinawa
  - Panama Canal
- Some newspaper and magazine articles have supported these allegations.
  - Example: Jon Mitchell, *The Japan Times*, *Agent Orange and Okinawa: The Story So Far* at <http://features.japantimes.co.jp/agent-orange-in-okinawa/>

# Actual Agent Orange Exposure – Guam



- Yale Law School Veterans Legal Services Clinic researched and published a white paper w/ NVLSP concluding that it is at least as likely as not that Vets who served on Guam from 1962 to 1975 were exposed to AO and other dioxin-containing herbicides.
  - White Paper:  
[https://www.nvlsp.org/images/uploads/2020.05.11\\_-\\_NVLSP-VLSC\\_White\\_Paper\\_Yale.pdf](https://www.nvlsp.org/images/uploads/2020.05.11_-_NVLSP-VLSC_White_Paper_Yale.pdf)
  - Appendix to White Paper:  
[https://law.yale.edu/sites/default/files/area/clinic/document/2020.05.11\\_-\\_nvlsp-vlsc\\_white\\_paper\\_compiled\\_appendix.pdf](https://law.yale.edu/sites/default/files/area/clinic/document/2020.05.11_-_nvlsp-vlsc_white_paper_compiled_appendix.pdf)

# Actual Agent Orange Exposure – Guam



- Official government accounts and credible veteran testimony demonstrated significant dioxin exposure pathways among Guam Vets as a result of spraying, mishandling, and disposal in documented areas.
- Widespread dioxin exposure is further supported by scientific evidence of dioxin contamination from EPA and DoD testing at these sites during the 1980s and 1990s.

# Actual Agent Orange Exposure – Guam



- Official accounts confirm numerous individual affidavits describing the storage, spraying, and disposal of AO and other herbicides at:
  - Guam cross-island fuel pipeline
  - Andersen Air Force Base (AAFB) and AAFB annexes
  - AAFB and AAFB Annex perimeters
  - Marianas-Bonins Command (MARBO) Annex
  - AAFB flight line and surrounding areas
  - USAF or U.S. Navy fuel storage facilities
  - USAF or U.S. Navy power stations
  - Areas near Urunao Beach or Ritidian Point
  - Military landfills, waste piles, and over-the-cliff dumpsites
  - Fire-fighter training areas

# Actual Agent Orange Exposure



- VA has granted a few individual claims based on exposure in Guam and other locations where DoD has not confirmed the presence of AO/dioxin, typically based on a finding that the Vet's statements and buddy statements were credible
- Such decisions are rare and have no precedential value

# Actual Agent Orange Exposure



- To support such a claim, Vet should submit:
  - Detailed statement regarding the exposure, including an explanation of how Vet knew the substance was AO
  - Buddy statements corroborating the exposure
  - Articles from reputable sources confirming the use of AO in the location (including NVLSP/Yale White Paper)
  - BVA decisions in which exposure at the location was conceded, ideally for the dates the Vet alleges exposure
    - Search here: <https://www.index.va.gov/search/va/bva.jsp>

# Questions

